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AGENCY DECISION

In its final decision issued October 18, 1973, the agency found that "sex discrimination exists in the Bureau of Apprenticeship and Training (BAT), Region IV and nationwide" and noted that this decision was in accord with that of the Complaint's Examiner which was issued on August 30, 1973, and adopted the decision of the Complaint's Examiner. The decision afforded the complainant the following relief:

(1) Priority consideration for the next available trainee position leading to an Apprenticeship and Training Representative (ATR) position in BAT and, if not selected, BAT be required to record the reasons for nonselection;

(2) BAT initiate procedures through appropriate channels in the Department of Labor to review the present Single-Agency Qualifications Standards, GS-243, for Apprenticeship and Training Representative positions to determine if those standards allow women to compete equally with male applicants;

(3) BAT submit periodic reports to the Director of EEO concerning the progress of the review procedures, the first report to be filed within thirty (30) days of the issuance of this final decision; and

(4) BAT to submit an upward mobility program for nonprofessional women in both clerical and non-clerical positions which will provide training opportunities to allow career development and advancement. A copy of the upward mobility program will be submitted to and reviewed by the Department's EEO Office.

Decision

REPRESENTATIONS TO THE BOARD

In her letter of appeal to the Board dated November 7, 1973, complainant and her counsel contended that she should immediately be granted the status of an ATR and afforded the appropriate retroactive pay increase. It is contended that since the standards discriminate against women on the basis of sex, she was therefore discriminated against on the basis of sex with respect to her application for the ATR position. It is further contended that the complainant had performed the "full range" of duties of an ATR, except for those in the "industrial setting" which were disallowed because she was not permitted travel funds. In addition, it is contended that a male employee

[5]

who served as an ATR for seven years failed to meet the qualification requirements.

In reply to the Board dated December 26, 1973, the agency stated:

> With regard to [complainant's] statement that she agrees that the present Apprenticeship and Training Representative (ATR) qualification standards discriminate against women, I would assert that the Department has made no such finding. This is borne out by the remedial relief portion of the final decision which in number 2 directs the Bureau of Apprenticeship and Training to initiate review of those standards to determine whether they permit women to compete equally with male applicants for ATR positions.

In addition, the agency noted that complainant had not shown that "but for" the discrimination she would have

been selected for the ATR position, and that consequently, she was not entitled to retroactive placement or to back-pay. Finally this letter stated:

> Finally, it is submitted that as long as the ATR qualifications standards, approved by the Civil Service Commission, are in effect the Department of Labor must adhere to them in making selections for ATR positions.

ANALYSIS AND FINDINGS

There are three major issues for decision in this appeal: (1) whether complainant was harassed in connection with the filing of her formal complaint of sex discrimination; (2) whether complainant was discriminated against on the basis of sex in connection with her nonselection for the position of Apprenticeship and Training Representative, GS-243-9, in September 1972; and (3) the nature of the corrective action to be afforded the complainant.

With regard to the issue of harassment, the Board notes that evidence introduced at the hearing indicates that the person who was to be complainant's supervisor was detailed to the Knoxville Area Office in February 1973.

[6]

Complainant contends that immediately upon his arrival, he began making disparaging remarks concerning the state of her files and of her supply cabinet. At the hearing, the State Supervisor testified that this incident did occur on the first day of the new supervisor's arrival, but did not occur immediately upon his arrival, p. 229. In addition, complainant contends that the State Supervisor used this incident to "downgrade" her performance. Extensive evidence upon the issue of complainant's performance was introduced at the hearing. It appears from the record

that the State Supervisor had considered that complainant's performance appraisals had been overly favorable ever since he reviewed her appraisal for the year 1969 in 1970. In addition, there is evidence which tends to indicate that complainant and the State Supervisor have a personality conflict, but this evidence does not tend to show that this official attempted to harass complainant because she had filed a formal complaint of sex discrimination.

With regard to the remaining issues, the Board has reviewed the entire evidence of record in this case and concurs in the determination that complainant was not discriminated against on the basis of sex in connection with her nonselection for the ATR position. Although complainant indicates that she was on the Civil Service Commission's Mid Level Register at the time the vacancy was announced and thus was eligible to be considered for certain positions at the GS-9 level (p. 104), there is evidence in the record which indicates that the Civil Service Commission maintains a separate ATR Register and, that unless candidates are unavailable, no attempt is made to select candidates from the Commission's Mid Level Register. In addition, there are four specialized experience requirements which candidates for the ATR position must meet. Candidates will not be considered, even if they are listed on the Mid Level Register, if they do not meet these specialized experience requirements, A-11, A-12.

The record reveals that Region IV had never used the Mid Level Register in filling ATR positions and that in filling the vacancy in question the ATR Register was used. Complainant was not on the ATR Register. Therefore, we find that she was not discriminated against on the basis of sex in connection with her nonselection for the specific position in question.

With regard to the nature of the corrective action or remedial relief set forth by the agency, the Board notes that this corrective action is based on the agency finding that discrimination on the basis of sex exists in BAT, but not on the finding that the standards themselves are discriminatory in nature. The Board concurs with this determination and notes in this connection that at present there is only one female employed as an ATR in BAT and that at present there are no females employed as ATRs in Region IV, nor

[7]

have there ever been any females employed as ATRs in Region IV. Apparently, there was one other female ATR in BAT who is now retired. It appears that these two female ATRs were appointed as the result of a training program conducted in the latter part of the 1960's.

It appears that the lack of females in BAT may be attributable to the fact that the specialized experience requirements, while seemingly equally applicable to men and women, may tend to exclude women because they stress experience in the construction trades and trade unions which many women in our society may not at present possess. We note that this problem is addressed in item number 2 of the agency's planned corrective action.

DECISION

Based on the foregoing findings, the Board of Appeals and Review hereby affirms the agency decision of October 18, 1973 and finds that complainant had not been individually discriminated against on the basis of sex in connection with her nonselection for the position of ATR in BAT, and concurs with the agency finding that discrimination exists

in BAT and hereby expresses support for the four items of relief set forth by the agency as corrective action.

Civil Service regulations provide that decisions of the Board of Appeals and Review are final and there is no further right of administrative appeal. However, if complainant is not satisfied with this decision, she is authorized by section 717(c) of the Civil Rights Act of 1964, as amended by the Act of March 24, 1972, to file a civil action in an appropriate U. S. District Court within thirty (30) calendar days of her receipt of the Board's decision in her case.

For the Commissioners:

/s/ William P. Berzak
William P. Berzak
Chairman

April 2, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

EUNICE W. FISHER

v.

PETER J. BRENNAN, HUGH MURPHY and GEORGE W. SABO

CIV 3-74-153

MEMORANDUM

(Filed September 18, 1974)

Plaintiff is a federal employee in the Bureau of Apprenticeship and Training [hereinafter referred to as "BAT"] of the United States Department of Labor. She has been a secretary-stenographer in the Knoxville, Tennessee office since 1953 when she was employed in grade GS-3. She has been in grade GS-5 since 1965. She can progress no further as a clerical employee with BAT.

Plaintiff filed this action under Title 42 U.S.C. §2000e-16 seeking review of the final decision

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of the United States Civil Service Commission Board of Appeals and Review which was made April 2, 1974. Plaintiff seeks review of the finding that she has not been individually discriminated against because of her sex in connection with her non-selection to the position of Apprenticeship and Training Representative [hereinafter referred to as "ATR"]. She also challenges the proposed remedies which were promulgated in connection with a

finding that sex discrimination as to women as a class does exist in BAT.

Plaintiff became aware of an opening for an ATR (which is a grade GS-9 position) in the Nashville, Tennessee office of BAT in September, 1972. She promptly applied for the job, and was notified by letter on September 29, 1972 by the Regional Personnel Officer of the Department of Labor that she was not qualified for the position.

After contacting an Equal Employment Opportunity Counsellor in October 1972, plaintiff filed a formal complaint with the Equal Employment Opportunity Commission [hereinafter referred to as "EEOC"] alleging that BAT had discriminated against her because of her sex primarily due to its failure to provide adequate training programs for women in plaintiff's position to enable them to qualify as ATRs. Record, p. 101. After an investigation by the EEOC, Assistant Secretary of Labor, Fred G. Clark, advised plaintiff of the following proposed remedies pursuant to 5

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CFR § 713.271(b)(2)[1]:

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[1] 5 CFR § 713-271(b)(2) provides:

"(b) Remedial action involving an employee. -- When an agency, or the Commission, finds that an employee of the agency was discriminated against and as a result of that discrimination was denied an employment benefit, or an administrative decision adverse to him was made, the agency shall take remedial actions which shall include one or more of the following, but need not be limited to these actions:

"(2) Consideration for promotion to a position for which he is qualified before consideration is given to other candidates when the record shows that discrimination existed at the time selection for promotion was made but it is not clear that except for the discrimination the employee would have been promoted. If the individual is not selected, the agency shall record the reasons for nonselection. This priority consideration shall take precedence over priorities under other regulations in this chapter.

"(1) That you be given priority consideration for the next available Apprenticeship and Training Representative (ATR) Trainee position in BAT and, if not selected, BAT be required to record the reasons for nonselection:

"(2) That BAT initiate procedures through the Civil Service Commission to review the present Single-Agency Qualification Standards, GS-243, for Apprenticeship and Training Representative positions to determine if these standards allow women to compete equally with male applicants; and

"(3) That BAT be instructed to submit an upward mobility program for nonprofessional women in both clerical and nonclerical positions which will provide training opportunities to allow career advancement and development. A copy of the upward mobility program would be submitted to and reviewed by the Department's EEO Office."

Plaintiff subsequently requested a hearing in a letter to Mr. Clark stating "the steps you list as a proposed remedy to my EEO complaint are unacceptable to me." Record, p. 35. She also made allegations to the EEOC that she had been harassed for filing her formal complaint. Record, pp. 33-34. The Director of EEO, Ms. Strode, requested the Civil Service Commission to assign a complaints examiner and notified the Commission

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of plaintiff's allegations of harassment. Plaintiff was notified by Ms. Strode of these actions. The Commission advised the Department and the plaintiff of the hearing date of June 14, 1973. A postponement was granted by the Complaints Examiner, Mr. William H. Decker, to June 27, 1973.

A lengthy hearing was held on June 27 and July 13, 1973, and on both occasions plaintiff was represented by counsel. The Complaints Examiner found that plaintiff had not met the specialized experience qualifications necessary for promotion.[2]

The evidence adduced at the hearing also indicated that plaintiff was on the Mid-Level Register when she applied for the ATR position and applicants from regions other than the region in which plaintiff was located had been selected from that register of applicants in filling ATR positions. However, the region in which plaintiff worked had never used that register in filling ATR positions, and plaintiff's name was not on the register (referred to as the "ATR register") used in filling the position for which she had applied. The Complaints Examiner found as follows:

> ". . . [I]t is agency policy to exhaust the ATR register before asking for a certificate from the Mid-Level register and, even then, the
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> specialized experience requirement must be met. It was pointed out that in Region IV there has been no occasion when the ATR register was exhausted and no appointment from the Mid-Level register to ATR has been made.
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> "The complainant cited no instance where a male employee has been chosen on this basis. Also, the

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[2] "The evidence clearly shows that if the complainant were given liberal credit for her claimed 'on-the-job' experience, she has not performed the full range of duties envisioned in the standard, as quoted earlier [See Record, pp. 26-27]. It is also apparent that she cannot expect to acquire such experience while employed in her present position." Record, p. 28.

complainant cited no instance in which the specialized experience requirement has been waived for any male applicant for the position since the current qualification standard has been in effect. Based on the foregoing, it is concluded that no more was required of the complainant than is required of male applicants for the position of Apprenticeship and Training Representative. Such being the case, no discrimination is found with respect to the rating of her application . . ."

Record, pp. 28-29.

The Complaints Examiner supported the remedial relief as proposed by Assistant Secretary Clark. On August 30, 1973, the Complaints Examiner transmitted his findings of fact and recommended decision to Mr. Clark.

On October 18, 1973, Assistant Secretary Clark issued the Department's final decision in which he adopted the findings of fact and recommended action of the Complaints Examiner in full. In addition, Mr. Clark included in the remedial relief that "BAT submit periodic reports to the Director of EEO concerning the progress of the review procedures, the first report to be filed within thirty (30) days of the issuance of this final decision."

Plaintiff appealed the Department's final decision to the Civil Service Commission's Board of Appeals and Review on November 7, 1973, pursuant to 5 CFR § 713.231.

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On April 2, 1974, the Board of Appeals and Review affirmed the Department's final decision in all aspects, including the determination that the evidence failed to show that plaintiff had been harassed by officials of BAT. Regarding the nature of the remedial relief to be afforded plaintiff under the Department's decision, the Board stated that:

". . . this corrective action is based on the agency finding that discrimination on the basis of sex exists in BAT, but not on the finding that the standards themselves are discriminatory in nature. The Board concurs with this determination and notes in this connection that at present there is only one female employed as an ATR in BAT and that at present there are no females employed as ATRs in Region IV, nor have there ever been any females employed as ATRs in Region IV . . ."

Record, pp. 8-9.

Finally, the Board expressed support "for the four items of relief set forth by the agency as corrective action." Record, p. 9.

Plaintiff filed the present action on May 3, 1974, invoking jurisdiction in this Court under Title 42 U.S.C. § 2000e-16. The complaint was filed against the Secretary of Labor and two employees of the Department of Labor's Bureau of Apprenticeship and Training, who now exercise supervisory authority over plaintiff.

Presently before this Court is defendant's motion to dismiss the complaint under Rule 12(b), F.R.C.P., and in the alternative a motion for summary judgment pursuant to Rule 56, F.R.C.P., based on the

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pleadings and administrative record before this Court. Plaintiff has replied to both motions.

The Court does not deem it necessary to consider the motion to dismiss, since it has concluded that the case is appropriate for summary judgment disposition.

The First matter which must be considered is the matter of the proper scope of review of the administrative findings in this type of case. Defendant asserts that the scope of review in a case such as this is limited to a review of the administrative record to determine if the plaintiff received procedural due process in the administrative proceedings. Plaintiff, on the other hand, asserts that the Court must go beyond procedural due process and examine the record to see if nondiscrimination is established by the clear weight of the evidence, citing *Hackley v. Johnson*, 360 F. Supp. 1247 (D.C.D.C. 1973).

In Hackley, the Court held that in reviewing cases arising under Title 42 U.S.C. § 2000e-16, the district courts are not required to hold a trial *de novo* and that the proper scope of review is as follows:

> "The District Court is required by the Act to examine the administrative record with utmost care. If it determines that an absence of discrimination is affirmatively established by the clear weight of the evidence in the record, no new trial is required. If this exacting standard is not met, the Court shall, in its discretion, as appropriate, remand, take
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> testimony to supplement the administrative record, or grant the plaintiff relief on the administrative record."
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> 360 F. Supp. at 1252.

In reaching this conclusion in *Hackley*, the Court delved at length into the legislative history and purpose of the Act. This Court is likewise of the opinion that it should not duplicate the efforts of Federal agencies in seeking to resolve questions of discrimination in federal employment. These

cases invariably bring into focus fine distinctions between allegations of pure discrimination and an almost innumerable array of regulations pertaining to job qualifications. The Commission's expertise in investigating and remedying such matters is to be given due consideration. *Baum v. Zuchert*, 342 F.2d 145 (6th Cir. 1965); *Elmore v. Hampton*, 373 F. Supp. 360 (E.D. Tenn. 1973); *Johnson v. United States Postal Service*, 364 F. Supp. 37 (N.D. Fla. 1973); *Handy v. Gaylor*, 364 F. Supp. 676 (D. Md. 1973).

The relief which plaintiff seeks from this Court is as follows: (1) that plaintiff be awarded back pay to September 1972 at the rate of an ATR; (2) that the Court order the Department of Labor to employ plaintiff as an ATR with length of service from September 1972; (3) that plaintiff be awarded a punitive sum.

There is no question that one of the options available to an agency or the Commission in affording

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relief to a federal employee is that of awarding back and retroactive promotion.[3] However, in the instant case

[3] 5 CFR § 713.271(b)(1) provides that "[w]hen an agency or the Commission, finds that an employee of the agency was discriminated against and as a result of that discrimination was denied an employment benefit . . . the agency shall take remedial actions which shall include one or more of the following . . . (1) Retroactive promotion, with backpay computed in the same manner prescribed by § 550.804 of this chapter, when the record clearly shows that but for the discrimination the employee would have been employed at a higher grade, except that the backpay liability may not accrue from a date earlier than 2 years prior to the date the discrimination complaint was filed, but, in any event, not to exceed the date he would have been promoted. If a finding of discrimination was not based on a complaint, the backpay liability may not accrue from a date earlier than 2 years prior to the date the finding of discrimination was recorded, but, in any event, not to exceed the date he would have been promoted."

the proposed remedies did not include such relief.[4] It is to be noted that under the regulations there must be a finding that "but for the discrimination the employee would have been promoted . . ." in order for the agency or Commission to award back pay or retroactive promotion under §713.271(b)(1).

The Court has carefully reviewed the record and pleadings and papers filed in this case and concludes that there is substantial evidence in the record to support the administrative finding that plaintiff was not selected to the position of ATR because she failed to meet the specialized experience requirements for the job and not because she was singled out for sex discrimination. The Court considers it significant that plaintiff was on the Mid Level Register at the time the vacancy occurred and the record indicates that the Commission maintains a separate ATR register from which ATRs are normally selected. ATRs are not usually

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selected from the Mid Level Register unless candidates on the ATR Register are unavailable. Furthermore, candidates who are selected from the Mid Level Register must still meet the specialized experience requirements. In filling the vacancy in question here the ATR Register was used and plaintiff was not on this Register. The region in which plaintiff works has never used the Mid Level Register in filling ATR positions.

The Court holds that on the basis of substantial evidence in the record to support the finding that plaintiff was not individually discriminated against, the administrative finding should not be disturbed. See *Tomlin v. United States Air Force Medical Center*, 369 F. Supp. 353, 356 (S.D. Ohio, 1974); *Handy v. Gaylor*, supra, at 679.

[4]See n. 1, supra, and accompanying text.

As to the proposed remedies which plaintiff challenges, the Court is of the opinion that the discretion exercised in affording such remedies was not arbitrary or capricious in any manner; rather the proposed remedies seem to be a logical method for providing for the upward mobility of women in BAT who heretofore and presently may not be qualified for the position of ATR. Priority is to be given this plaintiff for the next ATR Trainee position. In the absence of arbitrariness or capriciousness in the remedial actions taken by an agency or the Commission, the Court should not disturb the discretion exercised in seeking to remedy discrimination in the federal employment system. See *Tomlin*, supra, at 356.

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Accordingly, it is ORDERED that defendants' motion for summary judgment be, and same hereby is, granted.

Enter:

ROBT. L. TAYLOR
United States District Judge

No. 75-1214

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EUNICE W. FISHER,
Plaintiff-Appellant

V.

PETER J. BRENNAN, HUGH C. MURPHY and GEORGE W. SABO,
Defendants-Appellees

ORDER

Before: CELEBREZZE, MILLER and ENGEL, Circuit Judges

Eunice W. Fisher, an employee in the Bureau of Apprenticeship and Training (BAT) of the United States Department of Labor, filed this action in the district court under 42 U.S.C. §2000e-16 after the United States Civil Service Commission Board of Appeals and Review determined that while there had been discrimination on account of sex generally in the Bureau respecting certain personnel practices, that plaintiff had not been a victim of it when her application for consideration as an Apprenticeship and Training Representative (ATR) was rejected.

It appearing that the finding that plaintiff was not discriminated against on account of her sex is supported by

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substantial evidence and that no error intervened in the proceedings,

IT IS ORDERED that the judgment of the district court be and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk
By /s/ Grace Keller
Grace Keller, Chief Deputy

TITLE 42, UNITED STATES CODE

* * *

§ 2000e-16. Employment by Federal Government—Discriminatory practices prohibited; employees or applicants for employment subject to coverage

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies (other than the General Accounting Office) as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

* * *

SPECIAL QUALIFICATIONS FOR ATR

1. As an active member of a functioning joint apprenticeship committee.

2. As an officer of a union or a trade association, to the extent that the duties actively involved the development or administration of an apprenticeship program or combined apprenticeship and other industrial training program.

3. As a coordinator or director of a program for apprentice training or combined apprenticeship and other industrial training.

4. As a training representative or administrator in the field of apprenticeship, working with labor or management in an industrial setting.